Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

No. 02-1235

IN THE

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC and WILLIAM LYNN, M.D., on behalf of themselves and their patients seeking abortions,

Petitioners,

v.

COMMISSIONER OF THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, GOVERNOR OF THE STATE OF SOUTH CAROLINA, and HENRY McMASTER, in his official capacity as Attorney General of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

This petition arises from the Petitioners' constitutional challenge to regulations governing abortion facilities in South Carolina and marks the second time the Petitioners have come before the Court seeking a writ of certiorari. Petitioners filed this action in June 1996. Following a bench trial, the District Court issued on February 5, 1999, an order permanently enjoining enforcement of the regulations, holding that they violated the Due Process and Equal Protection Clauses of the United States Constitution. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 744-45 (D.S.C. 1999). The Fourth Circuit Court of Appeals reversed, *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 179 (4th Cir. 2000) (*Bryant I*), and this Court denied the petition for writ of certiorari. 531 U.S. 1191 (2001).

Following remand from the Fourth Circuit, the District Court received briefs on four additional claims that the District Court's February 5, 1999 Order had not addressed. In an Order dated August 31, 2001, the District Court held that Regulation 61-12 did not violate the United States Constitution regarding alleged vagueness, alleged delegation of veto power over medical facility licensing to third parties, and the alleged violation of the Establishment Clause. App. 54-58. Although the District Court did hold that Regulation 61-12 violated the petitioners' constitutional right to informational privacy, A. 58-59, it also found that this portion of the Regulation was severable from the remaining portions of the Regulation. App. 59.

The Petitioners appealed the District Court's order relating to all claims except informational privacy, and the Respondents cross-appealed on the informational privacy issue. The Fourth Circuit affirmed those rulings of the District Court that upheld the regulations, and reversed the District Court's ruling regarding informational privacy, thus issuing an opinion that effectively upheld the Regulation in its entirety. *Greenville Women's Clinic v. Commissioner, South Carolina Department of Health and Environmental*

Control, 306 F.3d 1 (4th Cir. 2002) (*Bryant II*). Petitioners then filed the petition for a writ of certiorari that is now before the Court. In it, they urge the Court to grant certiorari on each of the four constitutional issues addressed by the Fourth Circuit in *Bryant II*. Again, those issues involve: (1) the alleged constitutional right to informational privacy; (2) the Establishment Clause; (3) the non-delegation doctrine; and (4) a vagueness challenge. For the reasons that follow, the State respectfully requests that the Court deny the petition.

RESPONSES TO ARGUMENTS ADVANCED BY PETITIONERS

I. GWC first argues that this Court should grant certiorari on the issue of whether Section 102(F) of Regulation 61-12 violates the constitutional right to informational privacy that Petitioners' allege this Court recognized in *Whalen v. Roe*, 429 U.S. 589 (1977). The critical issue in this case, however, and the critical issue in the context of subsequent similar cases involving similar regulations, is whether *Whalen* even applies in the context of facial challenges to the recordkeeping and reporting requirements of abortion providers. The State submits that a *Whalen* claim will not lie in that context, having been displaced by *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992). Critically then, since Petitioners' *Casey* claim was the subject of the first Fourth Circuit opinion in this case, and because this Court denied the petition for a writ of certiorari in that case, Petitioners' informational privacy claim is not now properly before this Court.[1]

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1. The State distinguishes between facial challenges and as-applied challenges under *Whalen* in the context of abortion regulations because it is possible that although an abortion regulation governing medical records does not impose an undue burden on a woman's right to choose, information obtained pursuant to the regulation could theoretically be actually disclosed in a manner inconsistent with the constitutional right to informational privacy, assuming that there is such a right. But, as (Cont'd)

In *Casey*, the joint opinion of Justices O'Connor, Kennedy, and Souter, stated point blank that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[2] 505 U.S. at 878. Applying that standard to the recordkeeping and reporting requirements of the Pennsylvania statute at issue in *Casey*, the joint opinion concluded that those requirements were constitutional because "[t]he collection of information with respect to actual patients is a vital element of medical research," and the Court did not find "that the requirements impose a substantial obstacle to a woman's choice."[3] *Id.* at 900-01. The opinion expressly considered patient confidentiality in making this determination. *See Casey*, 505 U.S. at 900 (joint opinion) (factoring into the analysis of the recordkeeping provisions the fact that "the identity of each woman who has had an abortion remains confidential").

In the previous appeal in this case, the Fourth Circuit ruled that, under the undue burden standard articulated in *Casey*, Regulation 61-12 passed constitutional muster

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explained in the body of this response, facial due process challenges to abortion regulations are properly analyzed under the undue burden standard, not the strict scrutiny standard for which Petitioners advocate.

2. The joint opinion made this statement in Part IV, in which the authors were speaking only for themselves in adopting the undue burden standard. In subsequent cases from this Court, however, a majority has applied that standard. *See Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (setting forth the standards governing challenges to abortion regulations "in the language of the joint opinion in *Casey*" and "apply[ing] them to the circumstances of th[e] case"). Thus, insofar as the Due Process Clause is concerned, the undue burden standard currently governs challenges to regulations that impact abortion.

3. Justice Stevens joined this portion of the Court's opinion, and Chief Justice Rehnquist and Justices White, Scalia, and Thomas concurred in the judgment. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 911 (1992) (Stevens, J. concurring in part and dissenting in part); *id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

notwithstanding the recordkeeping and reporting requirements (and actually cited *Whalen* in the relevant passage):

> Nor does it unduly burden a woman's right to decide to obtain an abortion that DHEC officials may inspect abortion clinics and copy necessary documents. Such inspections ensure compliance with health care standards, an end which the copying provision also furthers. *See Danforth*, 128 U.S. at 79, 81 (noting that a statute that allowed medical records to "be inspected and health data acquired by local, state, or national public health officers" did not have a "legally significant impact or consequence on the abortion decision or on the physician-patient relationship" (internal quotation marks omitted)). *This is particularly so in view of the Regulation's requirement that "all records shall be treated as confidential," thereby respecting patients' privacy. See id.* at 80 (noting that proper respect for patient's confidentiality was a factor in upholding reporting requirement); *cf. Whalen v. Roe*, 429 U.S. 589, 602 & n.29 (1977) ("disclosures of private medical information to . . . public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient").

Bryant I, 222 F.3d at 171-72 (emphasis added). This Court denied the petition for a writ of certiorari in *Bryant I*. 531 U.S. 1191 (2001). Thus, the Due Process challenge to the recordkeeping and reporting requirements of Regulation 61-12 is simply water under the bridge at this point, and Petitioners' informational privacy claim is therefore not properly before the Court. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997) ("Under [the law of the case] doctrine, a court

should not reopen issues decided in earlier stages of the same litigation."). [4]

Pausing to respond directly to arguments made by Petitioners, the State begins with Petitioners' suggestion in section IB that there is a circuit split concerning the proper resolution of informational privacy claims. *See* Petition for Certiorari at 11. The State disagrees that there is a circuit split on the relevant question presented by this appeal. Again, the informational privacy claim at issue is being asserted in the context of a facial Due Process challenge to recordkeeping and reporting requirements for abortion providers. This Court has established that such challenges are to be analyzed under the undue burden standard, and there is simply no disagreement among the Circuits about that basic fact.

Even assuming, as Petitioners' suggest, that there is a circuit split about how to resolve general informational privacy claims under *Whalen*, this case does not implicate that split because this case arises in the specific context of abortion regulations. Of all the cases cited by the Petitioners to establish a Circuit split on the *Whalen* issue, only one involved abortion regulations. *Cf. Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (addressing a *Whalen* claim in the context of an abortion statute) *with Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000) (discussing *Whalen* in the context of requirement that confidential information, including financial information and attorney-client communications, be disclosed prior to employment in the public sector); *American Fed. of Gov't Employees v. HUD*, 118 F.3d 786 (D.C. Cir. 1997) (discussing *Whalen* in the context of order requiring certain federal employees to respond to a questionnaire about their use of illegal drugs and their financial history); *Alexander v. Peffer*,

4. In fact, as evidence that Petitioners' *Whalen* claim is merely an attempt to recycle their *Casey* claim it is noteworthy that they cite *Casey* twice in arguing that the patients' informational privacy right has been compromised, *see* Petition for Certiorari at 17, 20, and also cite several of this Court's pre-*Casey* abortion cases.

993 F.2d 1348 (8th Cir. 1993) (discussing *Whalen* claim in the context of allegations that disclosures had been made on talk radio that appellant failed to qualify for a position as a police officer); *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991) (discussing *Whalen* in the context of claims that arose from a police department's mishandling of a videotape containing sexually explicit activity); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (discussing *Whalen* in the context of a background questionnaire required for public employment which asked about homosexual relations; marriages, divorces, and children; arrests or convictions of family members; and financial information)[5]; *Daury v. Smith*, 842 F.2d 9 (1st Cir. 1988) (discussing *Whalen* in the context of a requirement imposed by a public school that a certain person receive psychiatric treatment before returning to work as a teacher); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983) (discussing *Whalen* in the context of public inspection provisions of city financial disclosure law); *Denver Policeman's Protective Ass'n v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981) (discussing *Whalen* in the context of an order compelling discovery of personnel and staff inspection bureau files of certain police officers); *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (discussing *Whalen* in the context of disclosure of juvenile court records); *United States v. Westinghouse Elec. Co.*, 638 F.2d 570 (3d Cir. 1980) (discussing *Whalen* in the context of a subpoena duces tecum requiring company to disclose employees' medical records); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) (discussing *Whalen* claim in the context of a state constitutional amendment requiring financial disclosure from certain elected officials).

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5. The *Walls* Court analysis of the children issue did not directly discuss abortion but did conclude that "any details that are not part of the public record concerning . . . the birth of children are private and thus protected." *Walls*, 895 F.2d at 193. *Walls* preceded *Casey*, however, and so the constitutional protection afforded the woman's decision to abort is now governed by *Casey*. Thus, the *Walls* Court had no occasion to decide whether *Whalen* would still be applicable to abortion issues in a post-*Casey* world.

Although the *Lawall* case discussed a *Whalen* claim in the context of abortion regulations, there is no indication that the Ninth Circuit was presented with the argument that in the specific context of a facial challenge to recordkeeping provisions of an abortion regulation *Casey* displaced *Whalen* with regard to informational privacy claims ("the displacement argument"). The *Lawall* Court upheld the validity of the Arizona statute there at issue under both *Casey* and *Whalen*, concluding that it satisfied the undue burden test and did not infringe upon the right to informational privacy. With regard to the latter claim, the Court, rather than applying the strict scrutiny test for which the Petitioners in this case advocate, held that it was the State's burden "to demonstrate that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Lawall*, 307 F.3d at 790. To the extent that this articulation of the test to be applied to informational privacy claims in the context of abortion regulations differs from the undue burden test articulated in *Casey*, the State notes again that the Ninth Circuit was apparently not asked to address any potential problem with applying *Whalen* instead of *Casey*.[6] Furthermore, *Lawall* is consistent with the

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6. Indeed, Petitioners may well argue that the displacement argument set out above was not presented below and is therefore waived. There are at least three responses to that potential argument, the first being that if this Court agrees that the State waived the ability to contest the critical issue of the appropriate legal standard under which to analyze the informational privacy claims being asserted in this case, there is simply no point in this Court expending its resources on the issue and certiorari should be denied. Second, while the displacement argument certainly was not developed below with as much precision as it could have been, the State consistently argued that the recordkeeping provisions of Regulation 61-12 did not violate anyone's constitutional right to informational privacy and relied primarily on *Casey* and on the Fourth Circuit's opinion in *Bryant I*, in which the court held that the recordkeeping requirements satisfied *Casey*. *See* Brief of Appellees/Cross-Appellants at 41-42. Third, it is not even clear that the State could have pressed the displacement argument with much vigor in the courts below because, at least at a general level, *Whalen* would appear to govern the informational privacy claims in this case, and, as this Court has made (Cont'd)

Bryant II majority opinion to the extent that neither case held that strict scrutiny was applicable.

The Petitioners also allege, under section IA of their petition, that "South Carolina law undisputedly authorizes disclosure of abortion patients' medical records in licensing proceedings." Petitioners allege that South Carolina does not go far enough to ensure the confidentiality of abortion patients' records and that its failure to do so will significantly impact a woman's abortion decision. But confidentiality is a factor in the *Casey* analysis, which was the subject of *Bryant I*, and therefore is not properly before the Court. *Cf. Casey*, 505 U.S. at 900 (joint opinion) (factoring into the analysis of the recordkeeping provisions the fact that "the identity of each woman who has had an abortion remains confidential") *with Bryant I*, 222 F.3d at 171-72 (upholding recordkeeping and reporting requirements of Regulation 61-12 because the Regulation dictates that "all records shall be treated as confidential, thereby respecting patients' privacy" (internal quotation marks omitted)).

And finally, in Section IC, Petitioners argue that if the *Bryant II* majority had applied a proper *Whalen* analysis to the recordkeeping provisions at issue, the court would have come out differently. Again, the State contends that *Casey* sets forth the proper standard in this case and that that analysis was properly conducted in *Bryant I* and is now final. To the extent that Petitioners chastize the *Bryant II* majority for allegedly not following to the Fourth Circuit's own precedent in *Walls*, which had interpreted *Whalen* to require a compelling governmental interest to override the

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clear, "other courts should [not] conclude [this Court's] more recent cases have, by implication, overruled an earlier precedent," but should apply the precedent that apparently governs "leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Thus, if the Court grants certiorari on the informational privacy issue, the State should be allowed to present the displacement argument.

constitutional right to informational privacy, Petitioners' *Whalen* claim can be seen for precisely what it is: an attempt to return the Court to the pre-*Casey* days in which courts had erroneously interpreted *Roe* and its progeny to require strict scrutiny of a state's attempts to regulate abortion. *See Casey*, 505 U.S. at 871 (joint opinion) (expressly rejecting the application of strict scrutiny to regulations impacting abortion).[7] The State respectfully submits that the Court should decline this invitation.

In sum, this Court has declared that recordkeeping requirements in the context of abortion regulations are subject not to strict scrutiny but to the undue burden standard. There is no split in the circuits on this issue and, specifically, there is no split on how that holding affects the applicability of *Whalen* in the context of abortion regulations. Petitioners' attempt to craft a *Whalen* claim in the instant case is merely an attempted end-run around *Casey*. The *Casey* challenge to this Regulation has already run its course in the federal courts, having been the subject of a previously denied certiorari petition. To the extent that the appropriate level of confidentiality required by the Constitution to be afforded to abortion regulations is an important question of federal constitutional law, this Court has already resolved it: the undue burden standard applies. The State requests that the Court deny certiorari on the informational privacy claim.[8]

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7. Furthermore, it should be unsurprising that the *Bryant II* majority did not require the State to prove a compelling interest in this case, as the Fourth Circuit had done in *Walls*. This case involves regulations that impact abortion, and the State simply does not need a compelling interest to enact recordkeeping provisions in that context. It must only devise regulations that do not impose an undue burden on the woman's right to choose.

8. The State has made no attempt to this point to defend the analytical approach of the *Bryant II* majority, choosing instead to continue pressing the argument that *Bryant I* resolved this issue. This choice should not be construed as an admission that the *Bryant II* majority erred in its *Whalen* analysis in any respect. Should the Court grant a writ of certiorari on the *Whalen* issue, the State is fully prepared to defend the

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II. Petitioners next argue that this Court should grant certiorari to review the Fourth Circuit's conclusion that § 307 of the Regulation does not violate the Establishment Clause. Section 307, entitled "Consultation," provides that

> Arrangements shall be made for consultation or referral services in the specialties of obstetrics/gynecology, anesthesiology, surgery, psychiatry, psychology, clinical pathology and pathology, clergy, and social services, as well as any other indicated field, to be available as needed.

Petitioners' argue that this Court should grant certiorari on the Establishment Clause question based upon three alleged errors in the *Bryant II* majority opinion:

> First, the majority erroneously applied the *Salerno* standard to this claim, despite the fact

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majority opinion in *Bryant II*. Specifically, even assuming that a *Whalen* claim will lie in the context of this case, the *Bryant II* majority correctly concluded that the regulation adequately protected the privacy of medical patients. Petitioners' entire argument rests upon what they see as the potential for disclosure in licensing proceedings. But this Court explained in *Whalen* itself that "the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the . . . patient-identification program." *Whalen*, 429 U.S. at 601-02; *cf. Hodge v. Jones*, 31 F.3d 157, 166 (4th Cir. 1994) ("The tangential possibility of public disclosure of [private information] through such theoretical means as negligent or improperly-motivated state employees or fortuitous computer hackers, cannot by itself implicate a constitutional privacy right."). Furthermore, Petitioners overlook the fact that Section 402 declares that "[a]ll records shall be treated as confidential and shall be stored in a safe location." A. 103. Also, Section 44-7-310 of the South Carolina Code provides that "[i]nformation received . . . through inspection or otherwise which does not appear on the face of the [facility's] license *may not be disclosed publicly in a manner as to identify individuals or facilities*" except in a proceeding regarding licensing. That statutory statement is unequivocal: information that would identify any individual may *not* be publicly disclosed. As discussed above, to the extent there is an exception for licensing proceedings, this exception is "surely not a sufficient reason" for finding that Regulation 61-12 inadequately protects patient privacy. *See Whalen, supra* this footnote.

> that this Court analyzes facial Establishment Clause challenges under a less onerous standard[.] Second, the majority's construction of the [Consultation Provision] violates principles of statutory construction and federalism. Finally, the [Consultation Provision], as interpreted by the State, compels abortion providers to support and participate in religion.

Petition for Writ of Certiorari 21 (citations omitted).

In support of their first contention, i.e. that this Court analyzes facial Establishment Clause challenges under a less onerous standard than the no-set-of-circumstances test articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), Petitioners cite *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14 (2000). To the extent that *Santa Fe* can properly be considered to have modified the *Salerno* test, it only did so, if at all, in a limited set of circumstances not applicable to the present case. A brief review of *Santa Fe* will illustrate the point.

Santa Fe involved an Establishment Clause challenge to a school board policy permitting a school chaplain to deliver a prayer over the public address system before each varsity football game for the entire season. *See id.* at 294. The Court affirmed the judgment of the United States Court of Appeals for the Fifth Circuit striking down the policy. *See id.* at 317. The dissent strenuously objected that under the *Salerno* test there was some set of circumstances under which the policy could operate in accord with the Constitution, and that the policy should therefore be upheld, pending later challenge by an appropriately pled challenge to the policy as applied. *See Santa Fe*, 530 U.S. at 318, 326 (Rehnquist, C.J., dissenting). The majority responded to this argument, which had been pressed by the school district, by stating that this Court's

> Establishment Clause cases involving facial challenges . . . have not focused solely on the

> possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. . . . [A]s in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors articulated in *Lemon v. Kurtzman*, . . . which guides "the general nature of our inquiry in this area[.]" Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." It is therefore proper, as part of this facial challenge, for us to examine the purpose of the . . . policy.

Id. at 314.

This passage can be read two separate ways. It can be read to suggest that the only relevant inquiry in a facial Establishment Clause challenge is into the statute's purpose (e.g., "Our Establishment Clause cases involving facial challenges . . . have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."). If this reading is correct, the *Bryant II* majority was unquestionably correct in its ruling below that the Consultation Provision did not on its face contravene the Constitution. If the inquiry on a facial challenge is limited to "whether the statute has an unconstitutional purpose," even the dissent in *Bryant II* should have found the provision to be facially constitutional, as the dissent found that "[w]ithout more evidence of a religious purpose, the Consultation Provision survives the first prong of the *Lemon* test." A. 39-40 (*Bryant II*, (King, J. dissenting)).

To the extent, however, that the quoted passage from *Santa Fe* may be read to allow the Court to consider the other factors of the applicable Establishment Clause analysis in the context of a facial challenge, the case does not represent an overhaul of the *Salerno* standard. The policy at issue in *Santa Fe* was found to have been motivated by an

impermissible purpose, i.e. to advance prayer. Official enactments motivated by such a constitutionally impermissible purpose are per se violations of the Constitution and it may not make sense in the context of a challenge to an enactment so motivated to ask whether there might be some circumstances under which the enactment may nonetheless operate in a constitutional manner, i.e. without the effect of advancing or inhibiting religion. The *Santa Fe* Court seemed to recognize this very point by suggesting that the constitutional violation in that case was "inevitable." *Santa Fe*, 530 U.S. at 316 ("[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury."). Where an ensuing constitutional violation is certain, it makes little sense as a matter of judicial economy to send the case back and await the inevitable. Thus, *Santa Fe* is perhaps best read, not as rendering *Salerno* a jurisprudential remnant of a forgotten age, but as an indication from the Court that it will not apply *Salerno* when the very enactment of the policy, statute, or regulation was a per se violation of the Constitution or when constitutional injury will inevitably follow from its enactment.[9] Neither of these scenarios presents itself here.

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9. This possible reading represents a best-case scenario for the Petitioners. The other possible reading of *Santa Fe* is that it does not affect the *Salerno* analysis at all, because, as the Court in *Santa Fe* was quite clear about, the constitutional violation in that case had already occurred. Specifically, since the policy was found to be motivated by the impermissible purpose of advancing religion through compulsory prayer, the constitutional violation occurred at the moment the policy was enacted. *See, e.g. Santa Fe*, 530 U.S. at 314 (stating that the Constitution is offended by "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion."). Under this view of the case, the Court's discussion of *Salerno* may well have been dictum. Since the constitutional violation occurred at the moment of the policy's passage, there was, by definition, no set of circumstances under which the policy could have avoided constitutional difficulties. That fact would distinguish the case from *Salerno*, but would in no way detract from the *Salerno* analysis.

To explain why not, the State will pause briefly to incorporate Petitioners' second assignment of error on the Establishment Clause issue, i.e. that the *Bryant II* majority erred in its construction of the Regulation. Petitioners argue that "DHEC has interpreted [Section 307] to require that abortion providers establish ongoing consulting agreements with clergy," Pet. for Cert. 21, and that the *Bryant II* majority erred in holding otherwise. Putting aside the obvious problems with Petitioners' characterization of the ad hoc testimony of one individual as an official agency interpretation,[10] and assuming arguendo that the Regulation does require such "ongoing consulting agreements," there is no per se constitutional violation and no constitutional injury certain to follow from its implementation. Rather, the State submits that if *Bowen v. Kendrick*, 487 U.S. 589 (1988) is still good law, and there can be little doubt that it is, *see Agostini v. Felton*, 521 U.S. 203, 233-35 (1997) (citing *Bowen* several times in explanation of how to determine whether a government enactment results in excessive entanglement between church and state), the Consultation Provision is most assuredly constitutional. At the very least, in light of *Bowen*, the enactment of the Provision was not a per se constitutional violation or an official act from which a constitutional violation is certain to flow.

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10. The Petitioners essentially attempt to build their Establishment Clause case on the testimony of a single government employee (George Moore), contending that a few of the answers he gave to a couple of questions during the course of this litigation is the equivalent of an agency interpretation of its own regulation. The majority opinion in *Bryant II*, the Petitioners contend, gave inadequate deference to his statements. This proposition cannot be admitted. The statements referred to are not an official agency interpretation. The federal courts have recognized that a position taken in litigation is not the equivalent of a considered and reasoned judgment of the agency. A. 38, n.14 (*Bryant II* (King, J. dissenting)). As even the dissenting opinion in *Bryant II* recognized, Mr. Moore's statement is more fairly characterized, not as such a judgment, but as an ad hoc statement made by a single member of the agency during this litigation. *See id.* The State is confident that the *Bryant II* majority opinion gave this testimony its appropriate weight in resolving the Establishment Clause challenge.

Bowen v. Kendrick, 487 U.S. 589 (1988) involved both a facial and an as-applied Establishment Clause challenge to the federal Adolescent Family Life Act ("AFLA"). Congress passed AFLA in an attempt to address "the severe adverse health, social, and economic consequences that often follow pregnancy and childbirth among unmarried adolescents." *Id.* at 593 (internal quotation marks omitted). To this end, AFLA established a scheme for awarding grants "to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy." *Id.* (internal quotation marks omitted). Grant applicants were statutorily required, in designing programs to address the concerns of Congress, to "make use of support systems such as . . . family members, friends, religious and charitable organizations, and voluntary associations." *Id.* at 596 (internal quotation marks omitted). Applicants were required to describe in their submissions the ways in which they planned to "involve the families of adolescents, and involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." *Id.* (internal quotation marks and brackets omitted). No one disputed that, not surprisingly, "a number of grantees or subgrantees were organizations with institutional ties to religious denominations." *Id.* at 597.

After concluding that the "purpose" prong of an Establishment Clause inquiry was not at issue, the *Bowen* Court began its discussion of the "effects" prong by noting a couple of important facts. It noted, inter alia, that "[t]here is no requirement in the Act that grantees be affiliated with any religious denomination, although the Act clearly does not rule out grants to religious organizations." *Bowen*, 487 U.S. at 604. Furthermore, although it was

> [c]ertainly . . . true that a substantial part of the services listed as 'necessary services' under the Act involve some sort of education or counseling,

> . . . there is nothing inherently religious about these activities and appellees do not contend that, by themselves, the AFLA's 'necessary services' somehow have the primary effect of advancing religion.

Id. at 605 (citations omitted). The Court observed then, that

> it can be argued that the AFLA advances religion by expressly recognizing that 'religious organizations have a role to play' in addressing the problems associated with teenage sexuality. In this view, even if no religious institution receives aid or funding pursuant to the AFLA, the statute is invalid under the Establishment Clause because, among other things, it expressly enlists the involvement of religiously affiliated organizations in the federally subsidized programs, it endorses religious solutions to the problems addressed by the Act, or it creates symbolic ties between church and state.

Id. at 605-06 (citation omitted).[11]

The Court rejected this argument, reasoning that the provisions of the Act designed to ensure the involvement of religiously affiliated organizations

> . . . reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed. Nothing in our previous cases

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11. The Court also noted that "[s]econdly, it can be argued that the AFLA is invalid on its face because it allows religiously affiliated organizations to participate as grantees or subgrantees in AFLA programs." This part of the Court's discussion has no bearing on the instant case because the potential argument was premised on the fact that the Act "authorizes direct federal funding of religious organizations." *Bowen*, 487 U.S. at 606. No funds change hands under the Regulation being challenged in the instant case.

> prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems. Particularly when, as Congress found, "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties," it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote." In addition, although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services under the Act, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector[.]" In our view, this reflects the statute's successful maintenance of "a course of neutrality among religions, and between religion and non-religion[.]"

Id. at 606-07 (citations omitted).

The parallels between the statute at issue in *Bowen* and the Regulation at issue in this case are striking. The inclusion of "clergy" in the laundry list of organizations with whom abortion providers must have referral and consultation arrangements merely reflects the State's considered judgment that the religious perspective has something legitimate to contribute to preserving the psychological health of a woman facing a decision that this Court has described as "more than a philosophical exercise." *Casey*, 505 U.S. at 852. Nothing in this Court's previous cases

prevents the State from making this determination. Particularly when one considers the fact that to many female believers the potential impact of the abortion transcends secular psychology and may well have ramifications for her "immortal soul," *see Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 781 (Stevens, J., concurring), it seems quite sensible for the State to recognize that religious counselors may well have a great deal to contribute to serving the State's secular purpose of promoting and preserving the health of its women citizens. To the extent that the Consultation Provision has any effect of advancing religion it is at most incidental and remote. Furthermore, much like the challenged provisions in *Bowen*, the Consultation Provision requires abortion providers to have relationships with counselors in the private sector (i.e. psychologists and psychiatrists) and with other social services. By including secular and religious counselors in § 307, the State did little more than chart "a course of neutrality among religions, and between religion and non-religion[.]" *Bowen*, 487 U.S. at 607. *Bowen* dictates that the Consultation Provision of Regulation 61-12 is constitutional. The State respectfully requests that the Court deny certiorari on this issue.

III. GWC next argues that this Court should grant certiorari on the question of whether Regulation 61-12 effects a standardless delegation of licensing authority to area hospitals. To quote from the Petition, Petitioners argue that

> [T]he Regulation requires, as a prerequisite for licensing, that physicians who provide abortions either have admitting privileges at a local hospital that has successfully sought state certification as an abortion provider, or have a documented transfer arrangement with such a hospital and a written consulting agreement with a physician who has admitting privileges at such a hospital. In either case, the physician must obtain the cooperation of the local hospital, and

> in either case, the hospital must itself have successfully attempted to become certified by the State as an abortion provider. Nothing in the Regulation or South Carolina law prevents local hospitals from declining to apply for abortion certification or from denying a physician admitting privileges on the basis of the hospitals' opposition to abortion. Thus, the Regulation essentially grants hospitals the authority to prevent licensing of abortion facilities for virtually any reason, including opposition to abortion. Such a delegation of veto power over abortion providers' licenses violates Plaintiffs' right to due process.

Petition for Certiorari 26 (citation omitted).

Petitioners cite, inter alia, *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997) as support for their argument, but Petitioners' explanation of *Causeway* is a significant mischaracterization of that case. Specifically, Petitioners' parenthetical following the cite to *Causeway* characterizes the case as "striking down a delegation of standardless veto power over minors' abortions to judges, and explaining that 'this discretion itself, and not the exercise of it,' is unconstitutional." Petition for Certiorari 28. Although the quoted language does in fact come from the *Causeway* opinion, the quote is taken so out of context as to render it meaningless.

Causeway involved a challenge to a Louisiana statute requiring parental consent before a minor could obtain an abortion. After this Court decided *Bellotti v. Baird*, 443 U.S. 622 (1979), Louisiana amended the statute to comply with the Court's opinion. Specifically, so far as is relevant to this case, Louisiana added a bypass procedure by which the state courts were required to allow a minor to obtain an abortion if she could prove that she was sufficiently mature to make the decision, or if the court otherwise determined that an

abortion would be in the minor's best interest. The relevant language from *Bellotti* that Louisiana sought to track declared that

> If [the minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must* authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court *must* authorize the abortion.

Causeway, 109 F.3d at 1099 (citing *Bellotti*, 443 U.S. at 647-48) (emphasis in *Causeway*)).

After a couple of intervening amendments in the years between 1980 and 1995 that left the statute in compliance with *Bellotti*'s mandate that abortions for minors *must* be authorized in the above described circumstances, the Louisiana Legislature amended the statute in 1995 to provide that the state courts *may* authorize an abortion under those circumstances. Because the amended statute afforded judges discretion in circumstances in which *Bellotti* had held that an order allowing an abortion was mandatory, the Fifth Circuit held that the statute contravened *Bellotti* on its face. *Id.* at 1108.

> [T]he plain language of [the statute] states that juvenile court judges within Louisiana have the discretion to deny an abortion to a minor even though the minor demonstrates that she is mature, well-informed, or that the abortion would be in her best interest. This flies in the face of *Bellotti II* and its progeny.

Indeed the sentence immediately preceding the language quoted by Petitioners in their parenthetical reiterates the

critical point upon which the holding was based: "Juvenile Court judges within Louisiana have a legislatively prescribed choice whether to order an abortion for a minor who is mature, well-informed, or for whom an abortion would be in her best interest." It was for this reason that the Fifth Circuit stated that "[i]t is th[e] discretion itself, and not the exercise of it, that we find inconsistent with *Bellotti II*." *Id.* at 1110. *Causeway* had absolutely nothing to do with "a standardless delegation of a veto power," as Petitioners suggest. It had everything to do with a state statute that flatly contradicted one of this Court's holdings that was directly on point.[12]

Petitioners' citations to this Court's cases also provide them with no basis for relief. Petitioners first suggest that the majority opinion in *Bryant II* conflicts with *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). Again Petitioners are mistaken. In fact, in *Eastlake* the so-called non-delegation doctrine was found inapplicable because the case involved zoning decisions submitted by popular referendum to the people at large. In that circumstance, this Court concluded that the non-delegation doctrine was "inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves." *Eastlake*, 426 U.S. at 675. Thus, *Eastlake* can simply provide Petitioners no support.

The language quoted from *Eastlake* in the Petition for Certiorari is from a section of the opinion in which the Court was explaining why its earlier cases did not require a different result than that reached in *Eastlake*. 426 U.S. at 677. One of the cases the Court was discussing, *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), is the other case from this Court with which Petitioners contend

12. Furthermore, even a cursory reading of the case indicates that a *Causeway*-like analysis takes place in the context of the undue burden determination. *Causeway* was itself a *Casey* challenge, and the *Casey* determination has already been fully and finally made with regard to Regulation 61-12.

the majority opinion in *Bryant II* conflicts. Thus, the State will turn its attention to that case.

Roberge involved a challenge to a municipal ordinance declaring that "[a] philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118. The Court found this delegation to private property owners unconstitutional because the trustee that proposed to erect such a home had a constitutional right to "devote its land to any legitimate use" and the private property owners, in deciding whether to approve the proposed home, were "not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice." *Id.* at 121-22.

There are at least two reasons why *Roberge* does not control this case. The first is that, at least so far as admitting privileges at public hospitals are concerned, the hospitals are not entitled to "withhold consent for selfish reasons or arbitrarily" and are not free to "subject [physicians] to their will or caprice." It has been held as a matter of state law in South Carolina that "a public hospital cannot exclude a physician . . . from practice . . . by rules, regulations, or acts of the hospital's governing authorities, which rules, regulations, or acts have been described variously as unreasonable, arbitrary, capricious or discriminatory." *In re: Zaman*, 285 S.C. 345, 346, 329 S.E.2d 436, 437 (1985). Thus, physicians in South Carolina are entitled to due process in the public hospitals, and although Petitioners have attempted to make much of the fact that there is no way to ensure that private hospitals agree to form partnerships with abortion providers, there has been no allegation, no evidence, and no finding that the access to public hospitals is insufficient. Indeed, Petitioners have never had difficulty obtaining admitting privileges. A. 8-9.

Second, *Roberge* does not even apply to this case. As *Eastlake* made clear in its brief discussion of *Roberge*, the latter is about the delegation of *legislative* power. *Eastlake*, 426 U.S. at 677 (stating that *Roberge* involved "the delegation of *legislative* power . . . by the legislature to a narrow segment of the community" (emphasis added)). Unlike zoning decisions, there is nothing the least bit legislative about a hospital deciding whether it will grant admitting privileges to a physician. *Cf. Currin v. Wallace*, 306 U.S. 1, 15 (1939) (upholding provision of Tobacco Inspection Act declaring that no market for tobacco will be designated as such unless two-thirds of the growers vote in favor of it because the Act "does not involve any delegation of *legislative* authority" (emphasis added)); *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964) ("[W]e do not conceive the denial of an application for a license to be an act of legislation.").[13]

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13. Petitioners actually cite to *Hornsby* as support for their argument that the Regulation is an unconstitutional delegation of authority. As with the other arguments Petitioners advance, numerous points could be made to refute Petitioners' attempt to rely on *Hornsby*. For present purposes, however, the State will simply make the following observations. *Hornsby* involved the denial of an application for a permit to sell liquor. Hornsby alleged, inter alia, that the denial was "arbitrary, unreasonable, unjust, capricious, discriminatory," and contrary to due process. *Hornsby v. Allen*, 326 F.2d 605, 607 (5th Cir. 1964). After holding that the permit process was in the nature of an adjudicatory act, the Fifth Circuit held that the due process requirements of notice and a hearing would apply. *Id.* at 608. The Court held that the allegations of Hornsby's complaint were sufficient to survive a motion to dismiss, because, if proven, they would establish that Hornsby was denied a fair hearing. As stated supra at page 20, the South Carolina appellate courts have held that physicians in South Carolina are entitled to due process with regard to decisions on admitting privileges. Furthermore, although the Fifth Circuit in *Hornsby* did state that one aspect of a fair hearing was "an opportunity to know . . . of the objective standards which had to be met to obtain a license," *id.* at 610, any suggestion that Petitioners do not know how to go about securing admitting privileges is belied by the fact that they have been able to obtain such privileges. *See id.* at 612 (holding that the question on remand was whether there were "ascertainable standards . . . by which an applicant can intelligently

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When the above-quoted passage from the Petition for certiorari is read more closely, Petitioners' true argument becomes apparent. Petitioners object not so much to the requirement that physicians obtain admitting privileges than to the fact that, having made admitting privileges mandatory for abortion providers, the State did not absolutely require that hospitals grant admitting privileges to physicians that perform abortions. *See* Petition for Certiorari 26 (complaining that "[n]othing in the Regulation or South Carolina law prevents local hospitals from declining to apply for abortion certification or from denying a physician admitting privileges on the basis of the hospitals' opposition to abortion"). It is of course conceivable that at some future point the inability of physicians to make the necessary arrangements may amount to an undue burden on a woman's right to choose. Aside from the fact that the *Casey* challenge has already been heard and finally determined, the day has not yet come where the admitting-privileges requirement has had that effect. The Petitioners have been able to obtain the necessary privileges. A. 8-9.

And it bears noting that the same argument raised by Petitioners regarding the admitting-privileges requirement could be raised regarding a requirement that only physicians perform abortions. Namely, under Petitioners' theory, once a state imposes a physician-only requirement, the state must make sure that physicians do not decline to provide abortions based on their opposition to abortion. But this Court has never seen a problem with physicians-only requirements, *see Mazurek v. Armstrong*, 520 U.S. 968 (1997), and, similarly, there is no cause for alarm regarding the

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(Cont'd)

seek to qualify for a license"); *cf. Harris v. Lukhard*, 733 F.2d 1075, 1080 (4th Cir. 1984) (stating the concern of *Hornsby* and other similar cases was "to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries") (internal quotation marks omitted)). Petitioners have never been denied admitting privileges, A. 8-9, and the fact that they have obtained them suggests quite obviously that the criteria for obtaining them is sufficiently clear.

admitting-privileges requirement. Employing basically this line of reasoning, the Eighth Circuit has recognized the similarity between the physicians-only requirement and the requirement that physicians performing abortions have surgical privileges in order to perform abortions:

> The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs' due process rights than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board. Both requirements represent the state's legitimate effort to ensure that abortion is "as safe for the woman as normal childbirth at term . . . and is performed by medically competent personnel under conditions insuring maximum safety for the woman."

Woman's Health Center of West County, Inc. v. Webster, 871 F.2d 1377, 1382 (8th Cir. 1989). The Eighth Circuit thus upheld the surgical-privileges requirement and did so under its pre-*Casey* strict scrutiny standard. The point quite simply is that: (1) there is nothing facially problematic with requiring physicians providing abortions to obtain admitting privileges; and (2) if and when the admitting-privileges requirement gets to the point of imposing an undue burden on a woman's right to choose, this Court could visit the issue at that time. There is no reason to address the issue now, in the context of a case in which the challenged Regulation has survived a *Casey* challenge, and in which the Petitioners have had no difficulty obtaining the requisite admitting privileges. A. 8-9.

IV. GWC next argues that the *Bryant II* majority erred in applying *Salerno* to Petitioners' claim that § 103(c) of the Regulation is unconstitutionally vague. Petitioners assert that under the proper standard of vagueness review (which they never articulate), Section 103(c) must be stricken down as unconstitutional. Since Petitioners only make cursory arguments with regard to the vagueness issue, dedicating little more than a page in their thirty-page petition to the issue, the State will respond in kind.

Section 103 establishes a graduated penalty scheme for abortion facilities that are not in compliance with the Regulation. Subsection C provides that it shall be a Class III violation, the least serious category of violation, for a facility not to be in compliance with "the best practices as interpreted by the Department." A. 78. Petitioners focus solely on the "best practices" language in suggesting that this subsection of the Regulation is unconstitutionally vague. Petitioners overlook, however, several important aspects of Section 103 read as a whole. First, a "best practices" violation is a Class III violation, meaning that the first time a facility violates such a practice, nothing more than a warning is issued. This fact, of course, means that the facility will have notice that certain conditions violate the Regulation prior to ever incurring a monetary penalty. Furthermore, in deciding whether to impose a monetary penalty for a subsequent violation, Section 103(E) expressly directs inspectors to consider the "*specific conditions* and *their impact on health, safety, and well-being*; efforts by the facility to correct; overall conditions; history of compliance; any other pertinent conditions that may be applicable to *current statutes and regulations*." A. 79. Thus, the regulation makes clear that the "best practices" violation: (1) must have some relation to "health, safety, and well-being;" (2) must either relate to the requirements of Regulation 61-12 or other "current statutes and regulations;" (3) and that inspectors must identify the "specific conditions" thought to run afoul of requirements. There is, therefore, adequate limitation on inspectors' discretion. Furthermore, if a facility is of the

opinion that an inspector has exceeded his limited discretion under the Regulation, the facility can request an administrative hearing. A. 79. These facts support the conclusion of the *Bryant II* majority that § 103(c) of the Regulation is not unconstitutionally vague, and this Court should deny the request for a writ of certiorari on that issue.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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